

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK ALAN LYTLE,

Defendant-Appellant.

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UNPUBLISHED

May 17, 2002

No. 223962

Saginaw Circuit Court

LC No. 98-016227-FC

Before: Saad, P.J., and Owens and Cooper, JJ.

PER CURIAM.

The jury convicted defendant of voluntary manslaughter, MCL 750.321. The court sentenced defendant as a third habitual offender, MCL 769.11, to fifteen to thirty years' imprisonment. He appeals as of right and we affirm.

I. Excited Utterance

Defendant contends that the trial court erred in admitting certain statements made by Mike Hvensa under the excited utterance exception to the hearsay rule, MRE 803(2). We disagree.

MRE 803(2) provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

\* \* \*

(2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

Here, the stabbing and killing clearly satisfies the condition of a “startling event.” The question before the trial court that we review is – was the hearsay declarant still under “the stress of excitement” caused by the event when he made the challenged remarks?

The trial court has discretion to determine if the declarant, Hvensa, was still under the stress of the startling event (the stabbing incident) when he made the statements while at Michael Burtch's home. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). The facts clearly support the trial court's ruling that the hearsay declarant was still under the stress of excitement caused by the stabbing. We are not persuaded that the trial court abused its discretion in admitting Hvensa's statements. *Id.*; see also *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000).

## II. Exhibits

Defendant also challenges the admission into evidence of two knives, identified as exhibits 35 and 37. We find no basis for reversal.

The record shows that defense counsel listed as a proposed defense exhibit, the knife that was ultimately admitted as exhibit 35, and reveals that defense counsel unambiguously stated that he had no objection when the prosecutor later moved for the admission of exhibit 35. Accordingly, defendant waived any error regarding exhibit 35. Cf. *People v Riley*, 465 Mich 442; 636 NW2d 514 (2001). Furthermore, were we to address defendant's claim, reversal would be unwarranted because defendant failed to demonstrate plain error. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999). Contrary to defendant's assertion, the record does not show that exhibit 35 was offered as evidence of the weapon used in the stabbing. Indeed, the prosecutor said clearly that exhibit 35 was not the murder weapon.

We also reject defendant's claim that the trial court abused its discretion in admitting exhibit 37 as demonstrative evidence. In general, "[d]emonstrative evidence, including physical objects alleged to be similar to those involved in the incident at issue, is admissible where it may aid the fact finder in reaching a conclusion on a matter material to the case." *People v Castillo*, 230 Mich App 442, 444; 584 NW2d 606 (1998).

Here, the record reflects that the prosecutor established a sufficient foundation for the admission of the knife identified as exhibit 37. First, Dr. Kanu Varini, an expert in forensic pathology, testified about the characteristics and size of the knife. Dr. Varini determined that the blade length was about four inches. Dr. Varini also opined that the knife was of a type that could have produced the victim's wound, "[b]ased on the length of the wound of the skin, depth of the wound, the angle, which is one sharper than the other, and the length of the blade and the width of the blade of the knife." Additionally, Robert Mason testified that while at the scene of the right during which the victim was stabbed, he saw defendant with a knife that was similar in appearance and size to exhibit 37. In light of all the evidence, defendant has failed to show that the trial court abused its discretion in admitting exhibit 37 to show "similarity."<sup>1</sup>

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<sup>1</sup> Demonstrative evidence, including physical objects alleged to be similar to those involved in the incident at issue, is admissible where it may aid the fact finder in reaching a conclusion on a matter material to the case. See *People v Howard*, 391 Mich 597, 602-603; 218 NW2d (1974); *People v Gunter*, 76 Mich App 483, 493-494; 257 NW2d 133 (1977). As with all evidence, to be admissible, the demonstrative evidence offered must satisfy traditional requirements for relevance and probative value in light of policy considerations for advancing  
(continued...)

### III. Sentencing

Because defendant's crime was committed before January 1, 1999, the legislative sentencing guidelines do not apply. MCL 769.34(1); *People v Reynolds*, 240 Mich App 250, 253-254; 611 NW2d 316 (2000). Considering the seriousness of this offense in light of defendant's criminal history, the trial court did not abuse its discretion by imposing a minimum sentence of fifteen years. *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001). Defendant's sentence does not violate the principle of proportionality. *Id.* at 598-599. Defendant's claim of cruel and unusual punishment is not briefed and is therefore abandoned. Cf. *People v Kent*, 194 Mich App 206, 210; 486 NW2d 110 (1992). In any event, because defendant's sentence is proportionate, his constitutional claim fails. *People v Terry*, 224 Mich App 447, 456; 569 NW2d 641 (1997).

Affirmed.

/s/ Henry William Saad

/s/ Donald S. Owens

/s/ Jessica R. Cooper

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(...continued)

the administration of justice. See MRE 401-403; 23 CJS, Criminal Law, § 846, p 37. Beyond general principles of admissibility, the case law of this state has established no specific criteria for reviewing the propriety of a trial court's decision to admit demonstrative evidence. However, we find persuasive, and adopt for this state's jurisprudence, a test espoused by the Supreme Court of Missouri: A weapon similar to one allegedly used in the commission of a crime may be admitted as demonstrative evidence where substantial evidence attests to the similarity of the exhibit offered to the weapon allegedly used, there is no reasonable likelihood that the jury may fail to understand the demonstrative nature of the evidence, and the opposing party has ample opportunity for cross-examination regarding the demonstrative weapon. *State v Carter*, 955 SW2d 548, 561 (Mo, 1997). [*People v Castillo*, 230 Mich App 442, 444-445; 584 NW2d 606 (1998).]

Moreover, we reject defendant's claim that exhibit 37 should have been excluded either because it was not relevant under MRE 401, or was unduly confusing under MRE 403.